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May 12, 2004

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Via Facsimile & First Class Mail

Elaine Devine, Esq.  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

MAY 17 A 9:34

Re: MUR 5440 - Response on behalf of Susan P. Orr and Julie Packard

Dear Ms. Devine:

We write on behalf of our clients, Susan P. Orr and Julie Packard, both of whom have received notice concerning the above-referenced complaint filed with the Federal Election Commission ("FEC") by Bush-Cheney '04, Inc. and the Republican National Committee. This letter responds to the allegations that Ms. Orr and Ms. Packard have violated federal campaign contribution limits by virtue of their contributions to Victory Campaign 2004 ("VC04"), an organization registered under Section 527 of the Internal Revenue Code.

In December 2003, Ms. Packard and Ms. Orr each contributed in excess of \$25,000 to VC04. According to the registration materials filed with the Internal Revenue Service, VC04 is a joint fundraising committee for two other Section 527 organizations, America Coming Together - Nonfederal Account and The Media Fund. Both Ms. Orr and Ms. Packard relied on assurances from VC04 that its activities, and their contributions, were in compliance with federal campaign finance laws, including the Federal Election Campaign Act of 1971, as amended ("FECA"), and the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Ms. Orr and Ms. Packard have not otherwise been involved in the operation or activities of VC04 and its affiliated organizations, but they both believe that the assurances they received were true and that their contributions were legal.

Federal campaign laws impose limits on contributions to federal candidates and PACs, as well as to political party committees for "Federal election activity." "Federal election activity," a term defined specifically with respect to the fundraising limits for political parties, includes (1) voter registration activity during the 120-day period prior to a federal

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election; (2) voter identification, get-out-the-vote activity, or generic party campaign activity in connection with an election in which a candidate for federal office appears on the ballot; and (3) public communications that refer to a clearly-identified candidate for federal office and that promote, support, attack or oppose a candidate for that office. 2 U.S.C. §§ 431(20), 441i. This ban on "soft money" contributions to political parties was added to the FECA by the passage of BCRA, and was upheld by the U.S. Supreme Court in McConnell v. FEC (2003) 540 U.S. \_\_\_, 124 S.Ct. 619. While upholding these fundraising restrictions on political parties, the Supreme Court recognized that, unlike political parties, interest groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." McConnell v. FEC, 540 U.S. \_\_\_, 124 S.Ct. 619 at 686. Ms. Orr's and Ms. Packard's contributions were not made to a political party or other entity that is subject to limits under the FECA. Instead, their contributions to VC04 were intended for the types of activities that the U.S. Supreme Court has acknowledged fall outside of the FECA's fundraising limitations.

We note that the activities of Section 527 organizations have excited much controversy at the FEC in recent months. In March 2004, the FEC issued a notice of proposed rulemaking ("NPRM") to expand the current definition of "political committee" in order to subject some Section 527 organizations to the fundraising limitations imposed by the FECA. 69 FR 11736 (March 11, 2004). On April 14 and 15, 2004, the FEC held hearings on the NPRM and heard from numerous experts in the area of campaign finance regulation. The experts responded to a multitude of questions raised by the FEC, including, "Would such a regulation be consistent with the FECA, as amended by BCRA? Would it be consistent with Congressional intent?" 69 FR 11739. The written and oral comments received in response to the NPRM reflect widely differing views on the FEC's authority to adopt the proposed regulations, and the FEC's action on the NPRM is still pending.

Accordingly, the complainants have chosen to ignore the fact that (1) neither BCRA nor the holding in the McConnell case imposes any limits on contributions to organizations such as VC04 except to the extent that they are used to fund "electioneering communications," (2) neither the FEC's regulations nor the IRS's 527 rules impose any such limitations either, and (3) the FEC has not concluded otherwise, as is clear from its recent NPRM. Given the foregoing, it strains the imagination that any person of reasonable intelligence could possibly conclude that the FECA's limitations would apply to his or her contributions to organizations such as VC04. Even if the FEC does ultimately adopt regulations that would limit contributions to VC04, the retroactive



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application of such rules to Ms. Orr and Ms. Packard for their December 2003 contributions would be a violation of their due process rights.

In summary, Ms. Orr and Ms. Packard both assert that the contributions they made to VC04 were legal. To the extent that the FEC ultimately adopts regulations that would impose limits on such contributions, and if such regulations are upheld by the courts, the FEC cannot, consistent with due process, apply such new regulations to find Ms. Orr and Ms. Packard in violation of the FECA for their past conduct.

Please do not hesitate to contact me if you have any questions concerning this response.

Very truly yours,

*Kathryn E. Donovan*

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cc: Ms. Susan P. Orr  
Ms. Julie Packard